TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 152.

THE UNITED STATES, APPELLANT,

vs.

CERECEDO HERMANOS Y COMPANIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED NOVEMBER 8, 1907.

(20453.)

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1 THE UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

At a stated term of the District Court of the United States for Porto Rico, within and for the district aforesaid, begun and held at the court rooms of said court in the city of San Juan on the second Monday of April, being the ninth day of that month, in the year of our Lord one thousand nine hundred and six, and of the independence of the United States of America the one hundred and thirtieth.

Present, the Honorable Bernard S. Rodey, judge.

Among the proceedings had was the rendition of a judgment in the following case, to wit:

THE PETITION AND APPLICATION OF J. H. Causten, esq., collector of customs for the district of Porto Rico, for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the Board of General Appraisers on duty at the port of New York, in the matter of classification of certain wines imported by Cerecedo Hermanos y Compañia.	Petition for review.	No. 369.

Be it remembered that heretofore, to wit, on the sixth day of March, A. D. 1906, came the petitioner, by N. B. K. Pettingill, United States attorney, and files his petition in this cause, which said petition is as follows, to wit:

2 THE PETITION AND APPLICATION OF J. H. Causten, esq., collector of customs for the district of Porto Rico, for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the Board of General Appraisers on duty at the port of New York, in the matter of the classification of certain wines imported by Cerecedo Hermanos y Compañia. — Petition for review.

To the honorable the presiding judge of the District Court of the United States for Porto Rico:

The petition and application of J. H. Causten respectfully shows:

That your petitioner is, and at the several times hereinafter mentioned was, collector of customs for the port of San Juan, Porto Rico.

That Cerecedo Hermanos y Compañia hereinafter mentioned at the several times hereinafter referred to were and are a partnership composed of Manuel Cerecedo and Carmen Ramos, doing business as merchants and importers of foreign merchandise in the city of San Juan, Porto Rico, under the firm name of Cerecedo Hermanos y Compañia.

That on or about the second day of August, A. D. 1905, the said Cerecedo Hermanos y Compañia imported into the United States, to wit, at the port of San Juan, Porto Rico, from France, certain merchandise invoiced as "Red wine," which said merchandise purports to be more fully described as the merchandise covered by consumption entry No. 418 and protest No. 11 of the official serial
3 numbers of said custom-house at the said port of San Juan, Porto Rico, and subject to decision No. 171269 of the official serial numbers of the Board of United States General Appraisers on duty at New York, State of New York, and being further described and identified as thirty cases of red wine, each containing 24 bottles of more than a pint and less than a quart each, less than 24% of absolute alcohol by volume, from and product of France, upon the custom-house invoices relating to said merchandise.

That all of said merchandise so imported as aforesaid was classified by the apraiser at the port of San Juan, under paragraph 296 of the present tariff act and the reciprocity treaty with France of May 30, 1898, as being dutiable at $1.25 per dozen bottles, making a total of seventy-five dollars.

That said entry was liquidated upon the classification and said duty paid; that within ten days after such ascertainment liquidation and payment of said duties, to wit, on the 22nd day of August, A. D. 1905, the said Cerecedo Hermanos y Compañia being dissatisfied with said classification, ascertainment, and liquidation, and the decision of the said collector in the premises, gave notice to the said collector in writing of such dissatisfaction, which written notice distinctly and specifically set forth the reasons for the objections of said importers thereto, as follows: "The wine in question has been assessed at $1.25 per dozen bottles, when it should be per case of 24/2 bottles."

That thereafter, in due and proper time, your petitioner transmitted all the papers and exhibits on which said entry was made or connected therewith to the Board of the United States General Appraisers, then on duty at the port of New York, State of New York, United States of America, and thereafter, on the 5th day of February, 1906, said Board of United States General Appraisers, to wit, B. S.
Waite and H. M. Somerville, made and rendered their decision
4 in said matter against said classification, ascertainment, and decision made and rendered and duty levied and exacted as aforesaid, and in favor of said protest. And your petitioner avers that as such collector he is dissatisfied with the decision of the said Board of General Appraisers as to the construction of the law respecting the classification of the said merchandise and the duty imposed thereon.

Wherefore your petitioner, as such collector, now applies to this honorable court for a review of the questions of law and of fact involved in said decision of said Board of General Appraisers, and in respect to said entry and the said payment your petitioner specifies as his reasons for his objections thereto as follows, to wit: That said Board of General Appraisers erred in sustaining said protest and in finding, concluding, holding, and deciding that said merchandise in question should be assessed as dutiable at $1.60 per case of 24 bottles, each bottle containing over a pint, with an additional 5 cents per pint or fractional part thereof for the amount in excess of one pint in such bottles, and in not finding, concluding, holding, and deciding that it should be classified as wine dutiable at the rate of $1.60 for each dozen bottles, with proper allowance for a reduction of duty under the reciprocity treaty with France.

And your petitioner further prays that this honorable court for an order that the said Board of General Appraisers do return to this court the record and findings taken by them, together with a certified statement of the facts involved in said case and their decision thereon, and that upon said record and findings and such further evidence as may be taken herein the court proceed to hear and determine the questions of law and fact involved in said decision respecting the classification of said merchandise and the rate of duty imposed thereon under said classification, and that upon such determination said decision of said Board of General Appraisers be reviewed, reversed, and set aside; that your petitioner may retain said sum of money so assessed and collected by him as hereinbefore stated, and the costs of this proceeding, and that this honorable court afford such other and further relief to the petitioner as may be right and just in the premises.

D. E. RICHARDSON,
Special Dep. Collector of Customs for the District of Porto Rico.

N. B. K. PETTINGILL,
United States Attorney and Attorney for Petitioner.

Marshal's return of service of petition.

(Filed March 30, 1906.)

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Cerecedo Hermanos y Compañia by handing to and leaving a true and correct copy thereof with Manuel Cerecedo, member of the above-mentioned firm, personally, at San Juan, in said district, on the 29th day of March, A. D. 1906.

H. S. HUBBARD, *U. S. Marshal.*
JOHN L. HAAS, *Deputy.*

6 *Order for return of records.*

(Filed July 2, 1906.)

In the matter of the petition of collector of customs for review of decision of Board of General Appraisers upon importation made by Cerecedo Hermanos y Compañia.

Whereas J. H. Causten, collector of customs of the United States for the collection district of Porto Rico, has applied to this court for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers on duty at the port of New York, in the State of New York, which said decision was made and rendered on the 5th day of February, A. D. 1906, in the matter of the protest No. 11 of the official serial numbers of the custom-house at the port of San Juan, Porto Rico, classifying said merchandise for duty as red wine at the rate of $1.25 per case of 24 half bottles instead of per dozen bottles, under par. 296 of the tariff act now in force and the reciprocity treaty with France of May 30, 1893; which said merchandise was imported into the United States at said port of San Juan, Porto Rico, and entered at the custom-house thereof August 2nd, 1905, and is more fully described as being the merchandise subject to consumption entry No. 418, made at said custom-house at said port; and

Whereas said collector of customs has duly filed his application and petition for a review of said decision, praying, among other things, that said Board of United States General Appraisers be ordered to return to this court the records and the evidence taken by them therein, together with a certified statement of the facts involved in said case, and their decision therein:

7 Now, therefore, upon consideration of the premises, upon motion of the United States attorney for this district, it is hereby ordered that the three United States general appraisers on duty at the port of New York, State of New York, do, with all convenient speed, return to this court the records of said matter and the evidence taken by them therein, together with a certified statement of the facts involved in said case, and their decision therein.

And it is further ordered that this order be entered upon the minutes of this court, and served by the United States marshal for the Southern District of New York upon some member of said Board of three General Appraisers by delivering to such member a certified copy thereof.

Done and ordered in open court at San Juan, Porto Rico, this 2nd day of July, A. D. 1906.

B. S. Rodey, *Judge.*

Marshal's return on service of above order.

(Filed July 26, 1906.)

I hereby certify that on the 16th day of July, 1906, at the city of New York, in my district, I served the within order upon the within-

named Board of General Appraisers for the port of New York, by exhibiting to I. F. Fisher, as a member of the Board of General Appraisers, at #641 Washington st., N. Y. City, N. Y., the within original, and at the same time leaving with him a certified copy thereof.

WM. HENKEL,
United States Marshal
Southern District of New York.

Dated July 16, 1906.
J. G.

8 *Return of record of Board of Appraisers.*

(Filed July 26, 1906.)

United States District Court, District of Porto Rico. Suit 1821.

UNITED STATES *vs.* CERECEDO HERMANOS Y COMPAÑIA.	On application for review of a decision of the Board of United States General Appraisers.

NEW YORK, *Jul. 17, 1906.*

Said Board, sitting at New York, in response to the order of the court, hereby returns, as given below, the record in the above-entitled matter, and certifies that a complete statement of the facts involved in the case, together with the decision of the Board, is embraced therein, and that no other facts were ascertained by said Board than such as are thus shown.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE E. HAY,
Board of United States General Appraisers.

Specifically, the return comprises:
1. The importers protest (in Spanish), No. 171260.
2. Translation of same.
3. The report of the collector of customs thereon.
4. Certification by collector of payment of duties.
5. A copy of the decision of the Board.

9 Protest, No. 171260.

SAN JUAN, P. R., *22 de Agosto de 1905.*

Sr. collector customs, San Juan.

SEÑOR: Ese departamento nos cobra un addiccional de $37.70, segun liquidación pasada, referente á nuestro entry No. 418 correspondiente á 30 cajas de vino rojo, importadas por vapor francés "Montreal" entrado el 2 actual, procedente del Havre y escalas.

Por le presente elevamos á Ud. nuestra formal protesta, con ruego

de que sea trasmitida al Board U. S. General Appraisers de New York, en unión de una botella del referido vino, que sirvió de base para el aforo.

Ha sido aforado este vino á $1.25 docena, cuando debe ser la caja de 24/2 botellas.

Suplicamos se sirva acusarnos recibo de la presente para constancia y disponer que el adiccional de referencia ingrese como depósito, hasta la resolución de esta alzada.

Respetuosamente,

CERECEDO HERMANOS & Co. Sucs.
E. C.

[Translation of above letter.]

CERECEDO HERMANOS & Co.,
San Juan, P. R., August 22, 1905.

Collector of customs, San Juan, P. R.

10 SIR: The custom-house charged us an additional duty of $37.70, according to the statement of liquidation, on certain 30 cases of red wine, covered by entry No. 418, of French S. S. "Montreal," arrived from Havre and route the 2nd instant.

We request you to forward this, our formal protest, to the Board of U. S. General Appraisers at New York, together with a bottle of said wine, which served as the base of assessment.

The wine in question has been assessed at $1.25 per dozen bottles, when it should pay per case of 24/2 bottles.

We kindly request you to acknowledge the receipt of this letter, for our evidence, and to direct that the additional duty charged be treated as a deposit pending the decision in this matter.

Respectfully,

Signed. CERECEDO HERMANOS & Co.

CUSTOM-HOUSE,
Port of San Juan, Porto Rico, August 25, 1905.

I submit herewith the protest described below, with the accompanying invoice and entry, against my assessment of duty at $1.25 per dozen bottles on certain wine claimed to be dutiable at $1.25 per case of 24 bottles, returned by the appraiser as still wine in bottles, from and product of France, 24 bottles of 17 fluid ounces each to the case, and assessed with duty under the reciprocity treaty with France, in accordance with ——— ruling of ———. The requirements of section 14, act of June 10, 1890, have ——— been complied with by the protester.

Respectfully, yours, D. E. RICHARDSON,
Special Deputy Collector of Customs.

To the Board of U. S. GENERAL APPRAISERS, *New York.*

11

No.	Name of importer.	Vessel.	Date of entry.
11	Cerecedo Hermanos & Co	"Montreal"...	August 12, 1905.

NOTE.—In transmitting protests the requirements of article 63, regulations of August 7, 1899, should be strictly complied with. The number of inclosures should always be stated, and in counting the same each separate detached paper or group of papers (fastened together by pins, mucilage, or otherwise) should be counted as one.
2-3190. No. of inclosures, 2 (entry and protest).

UNITED STATES CUSTOMS SERVICE.
Port of San Juan, Porto Rico, August 22, 1905.

To whom it may concern:

This is to certify that the firm of Sucrs de Cerecedo Hermanos & Co. has paid on 30 cases of French wine, each case containing 24 bottles, imported per S. S. "Montreal," entry #418, duties in the amount of $75.00.

[Seal of collector of customs.]

D. E. RICHARDSON,
Special Deputy Collector.

12

Decision of the board.

UNITED STATES GENERAL APPRAISERS.
New York, Feb. 5, 1906.

In the matter of protest 171260, of Cerecedo Hermanos & Co. against the assessment of duty by the collector of customs at the port of San Juan. Before Board No. 3.

SOMERVILLE, General Appraiser:

The merchandise consists of 30 cases of red wine exported from France in bottles, each case appearing to contain 24 bottles. The collector assessed duty on the wine at the rate of $1.25 for each dozen bottles on the ground that each bottle contained over 16 ounces, namely, 17.3 ounces in each bottle, which is over one pint. The claim of the importers is in the following language:

"The wine in question has been assessed at $1.25 per dozen bottles when it should pay per case of 24/2." Due allowance was properly made by the collector for a deduction of duty under the reciprocity treaty with France.

The paragraph of the present tariff act under which this assessment appears to have been made was paragraph 296, where the following phrase occurs:

"In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or 24 bottles or jugs containing not more than a pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 5 cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs."

The wine in question being contained in cases of 24 bottles, and each bottle containing over a pint, was clearly subject to duty at $1.60 per case, and any excess beyond this quantity found in such bottles would be subject to a duty only of 5 cents per pint or fractional part thereof.

13 The collector erred in assessing duty at the rate of $1.25 for each case of a dozen bottles. The protest is sufficiently definite to cover this claim, and the assessment of duty will be made by the collector accordingly. The protest is sustained and the collector's decision reversed with instructions to reliquidate the entry accordingly. The record shows the protestants have paid as much as $75 in duty, which is at the rate of $2.50 per case of 24 bottles.

(Signed) BYRON S. WAITE,
H. M. SOMERVILLE,
Board of U. S. General Appraisers.

Journal entry.

(August 9, 1906.)

THE UNITED STATES
vs.
CERECEDO HERMANOS. } No. 369.

This cause coming on regularly for trial, both sides answer ready. Whereupon the court hears the testimony, and argument of counsel, and takes the matter under submission for final judgment.

Opinion.

(Filed August 13, 1906.)

The record in the case shows that the collector of customs at the port of San Juan, Porto Rico, charged the importing firm on thirty cases of red wine imported from France, containing twenty-four bottles in each case, and each bottle of which the collector

14 alleged contained 17.3 fluid ounces, or 1.3 more than a full pint, at the rate of $1.60 per dozen bottles, which, after deducting the proper amount under an existing reciprocity treaty with France, made a net amount of $1.25 per dozen bottles, or $2.50 per box or case, as packed, of twenty-four bottles.

The importing firm contends that the rate they should be charged is exactly half this amount, plus five cents per pint, or fractional part thereof, for any excess beyond one pint found in each bottle. The Board of Appraisers sustained this construction and said (T. D., vol. 11, No. 7, p. 28):

"The wine in question being contained in cases of twenty-four bottles, and each bottle containing over a pint, was clearly subject to duty at $1.60 per case, and any excess beyond this quantity found in

such bottles would be subject to a duty of five cents per pint, or fractional part thereof."

The goods were classified and the duty levied upon them under par. 296 of the tariff act of 1897, 30 Stats., 174, the pertinent portion of which reads as follows:

"In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs."

The question involved is not without difficulty, but under the rule that courts of justice must give effect to every portion of a statute rather than to only a part of it, the court is bound to sustain the Board of General Appraisers. It is difficult to see what the words used in the statute— "and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint, or fractional part thereof"—are intended to mean, unless it be that any surplus made up of small quantities found in such "pint" bottles more than one pint and in "quart" bottles more than one quart, shall be subject to a duty on the aggregate of these small quantities, of five cents per pint or "fractional part thereof." There could be no fractional part of a pint if the law intended, as claimed by the collector, to charge for a full additional pint for every small surplus quantity found in each bottle.

Counsel for the Government, during the hearing, claimed that if this view of the court is sound, then importers can easily evade the law by packing their wines in cases of twenty-four bottles containing just a little less than a quart each, and thus import the difference between a pint and almost a quart at five cents per pint, when twenty-four pints straight in bottles would have to pay $1.60, or 6⅔ cents per pint.

We do not think the statute justifies this contention. We believe that the intention of the lawmakers was to charge $1.60 per dozen "quart" bottles or twenty-four pint bottles of wine in a single case or box, and that within reasonable limits, if the quart bottles contained a little less than a quart and the pint bottles any less than a pint, they should still pay the duty as though they contained those full quantities, respectively; but that if either of them ran slightly over the prescribed quantities, then that the surplus should be subject to a duty at the rate of five cents per pint or fraction thereof in the aggregate. It was in evidence that "quart" and "pint" bottles are not exactly uniform in size in commerce nor are they always filled to exactly the same level in particular shipments. In fact, it was in evidence that the measurements of the wine in question ran under the pint (16 oz.) and over the pint as to particular bottles and that the 17.3 fluid ounces was, in the opinion of the collector, the average of the

thirty cases. The bottle exhibited to and measured before the court during this hearing ran even seventeen ounces, but it was filled to the cork.

16 The action of the Board of General Appraisers will therefore be sustained.

B. S. RODEY, *Judge.*

Petition of appeal.

(Filed August 27, 1906.)

IN THE MATTER OF THE PETITION OF COLLECTOR of customs of district of Porto Rico for review of decision of Board of General Appraisers as to rate of duty on red wine imported by Cerecedo Hermanos.	Docket No. 369.

The United States of America come now, by N. B. K. Pettingill, attorney of the United States for Porto Rico, by virtue of instruction of the Attorney-General of the United States, and considering themselves aggrieved by the findings and judgment made and entered herein on the 13th day of August, A. D. 1906, do hereby appeal from said findings and judgment to the Supreme Court of the United States, and they hereby pray that this appeal may be allowed and that a transcript of the record, papers, and proceedings upon which said findings and judgment were made, duly authenticated, may be sent to said Supreme Court of the United States, as provided by law and the rules and practice of said court.

N. B. K. PETTINGILL,
United States Attorney.

17 *Order.*

(Filed and entered Aug. 27, 1906.)

IN THE MATTER OF PETITION OF COLLECTOR of customs of District of Porto Rico for review of decision of Board of General Appraisers as to rate of duty on red wine imported by Cerecedo Hermanos.	Docket No. 369.

At a stated term, to wit, the April term, A. D. 1906, of the United States District Court for Porto Rico, held at the court room in the city of San Juan on Monday, the 27th day of August, A. D. 1906.

Present, the Honorable Bernard S. Rodey, judge of said court.

On motion of N. B. K. Pettingill, esq., attorney of the United States for said district, acting by express direction of the Attorney-General of the United States, it is ordered that an appeal to the Supreme Court of the United States from the findings and judgment

in the above-entitled cause, entered herein on the 13th day of August, 1906, be and the same is hereby allowed; and that a certified transcript of the record, testimony, stipulations, papers, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

B. S. RODEY, *Judge.*

18 (Filed Sept. 10, 1906.)

In the District Court of the United States for Porto Rico.

IN THE MATTER OF THE PROTEST OF J. H. Causten, collector of customs at San Juan, Porto Rico, for a review of the decision of the Board of General Appraisers sitting at New York, sustaining the protest of Cerecedo Hermanos y Compañia against the said Causten's classification and assessment of certain wines imported by them.	No. 369.

Transcript of testimony taken before the court.

AUGUST 9, 1906.

ANTONIO CERECEDO MILAN, called as a witness, after being duly sworn, testified as follows:

By the DISTRICT ATTORNEY:

Q. What is your name?

A. Antonio Cerecedo Milan.

Q. You are one of the members of the firm of Cerecedo Hermanos?

A. No, sir; I am attorney in fact of the house.

Q. Are you the one who made the protest in behalf of the house over the thirty cases of wine?

A. Yes, sir.

Q. Were you or not present at the measuring of that wine, the measuring of the bottles?

A. Yes, sir; I was present.

Q. How many bottles were measured, more or less?

A. I can not tell you the number, but my recollection is that a number of them were measured. I don't remember the number exactly, because several of them were measured.

Q. Was it in a measure just like this [showing witness a graduate]?

19 A. I don't recollect. I know that they used a measure, but I don't know which one.

Q. Isn't it true that since that time, since that protest, you gentlemen have written over to Spain requesting them to ship this same kind of wine in bottles that wouldn't run over a pint?

A. That is not possible.

By the COURT:

Q. The question is, Did you do it? Answer that.

A. I don't know.

Q. Do you know that anybody in the house did it?

A. No, sir; because I am the man in charge of the correspondence. A letter was written to the company telling them all about what happened with the customs.

By the DISTRICT ATTORNEY:

Q. And is not this a bottle that was shipped by them since they received that communication [showing witness a bottle of wine]? (Question was repeated by the interpreter.)

A. That I can not recollect, because there is a lot of that wine in the house, and it is all mixed up.

By the COURT. Well, why did you bring this here to measure by—what caused you to do it; this bottle; to give it to your counsel?

A. Mr. Hord asked me to bring here a bottle of wine, this morning, when he telephoned me that the case would take place to-day.

Q. What we want here, Mr. Witness, is a bottle of wine that you were charged extra duty on, if you have got it, and if not, we want one of the same size. Now, why do you say this is exactly the same size? How do you know it?

20 A. Because the company has not changed the bottles. We have been the agents of that company for twenty years, and it has always the same kind of a bottle. They can not have a special bottle for Porto Rico because the consumption here is so small.

By the DISTRICT ATTORNEY:

Q. Do any bottles vary an ounce, or half an ounce, even, when they are supposed to be the same?

A. They may change a little because, in spite of the fact that they are made in molds, nevertheless some of them may be of different size.

Q. There is a difference in the thickness of the glass, is there not?

A. I am not a glass manufacturer and could not give you an opinion of that.

Q. These bottles that were tested down there, the half dozen or over, did they all run over?

A. I remember that some of them had an exactness in the measure while there were others that did not have such an exactness, and that some portion has been done by myself in the house and with the same result.

The DISTRICT ATTORNEY. That is all.

(The bottle of wine which was produced is measured and found to contain one ounce over sixteen ounces.)

By Mr. HORD:

Q. Approximately, if you can tell us, how many cases of this wine has your house imported in Porto Rico per annum?

A. One hundred and fifty to two hundred cases.

By the COURT:

Q. Two hundred cases of twenty-four bottles to the case?

A. Twenty-four half-bottle cases.

21 By Mr. HORD:

Q. During all this time have you ever known of a different bottle being used, that was apparent to the eye of being of a different size, larger or smaller than this bottle?

A. We will not notice that detail.

Q. As far as you known, then, the bottles have been of the same kind?

The COURT. How would that be material?

Mr. HORD. That is all.

By the DISTRICT ATTORNEY:

Q. Was anybody else present besides yourself at the time those bottles were measured?

A. At the custom-house?

Q. Yes.

A. Which time—the last one or the first one?

Q. The time when you claimed to them that they did not hold over a pint and the measurement was made as a test. If more than one, tell who was present; in regard to these thirty cases.

A. I remember Mr. Causten and one of the customs inspectors and Mr. Richardson.

Q. Who did the measuring?

A. I don't remember that.

Q. Wasn't Mr. Oyster there—this gentleman here [pointing to Mr. Oyster]?

A. I don't remember who was the inspector.

The DISTRICT ATTORNEY. That is all.

Witness retires.

22 GUY H. OYSTER was called as a witness in behalf of the Government, and, after being sworn, testified as follows:

By the DISTRICT ATTORNEY:

Q. Your full name?

A. Guy H. Oyster.

Q. Your official position at the custom-house?

A. Examiner of merchandise.

Q. Do you remember the occasion when the examination of this wine was made—these thirty cases?

A. I don't remember the date, but I remember the incident.

Q. About what time was it?

A. Well, I should say it was about a little more than a year ago. About a year ago, I should say. A little more than that.

Q. Did you first examine the wine without the importer being present?

A. I did.

Q. Did you measure any of it then?

A. I measured one bottle from twenty per cent of the cases—one bottle out of six cases.

Q. You took one bottle out of every five cases?
A. I did.
Q. What was the result, so far as the cases you examined?
A. I returned them at seventeen and three-tenths, to conform to the average; none of them less than sixteen.
Q. None of them less and some of them more?
A. The average was seventeen and three-tenths.
Q. Afterwards were any more opened?
A. Mr. Cerecedo objected and a regauge was ordered, and Mr. Cerecedo was present when we opened the additional bottles.
23 Q. Do you remember who else was present?
A. I don't remember, but I think Mr. Ball, my predecessor. He is not in the service now. As I remember, I took the gauge in to the special deputy collector to show him.
Q. Do you remember whether Mr. Causten was there or not?
A. I don't remember. I think it was Mr. Richardson.

By the COURT:

Q. Is there any election in the measuring of wines? Have you any leeway in your measurements?
A. We have none whatever. The regulations say sixteen ounces. There is no way of arbitration.
Q. When a lot of liquors are shipped in pint bottles, do you always gauge them?
A. Always when there is sufficient excess to create any doubt. There is a small quantity of wine that comes in half liter bottles with a little excess; that is, thirteen or fourteen ounces.

By the DISTRICT ATTORNEY:

Q. And there is not much of this shaped bottle that comes in?
A. Very little of that capacity bottles.

By the COURT:

Q. Then, in any event, the court is to understand that you follow the letter of the law strictly and guage to the exact amount?
A. Exactly; yes, sir.
Q. And you don't take bottles in a case just because they call for a pint; you always measure them?
A. We accept the commercial pint, but if we see a pint bottle that contains more than a pint we measure it, and if it is found to contain more than a pint it is rated as more than a pint and less than a quart.
Q. Do you agree with Mr. Cerecedo that any of these bottles contained less than sixteen ounces?
A. I am quite sure they did not. There were none of them exactly sixteen.
24 Q. In this second guage, how many did you guage that time; how many bottles?
A. I don't remember, but a sufficient amount to convince myself that the first guage was correct and to convince the importer that both were correct. I think the first guage was confirmed by the reguage.

Q. And Mr. Cerecedo expressed himself as satisfied with the first guage?

A. In so far as he didn't claim we were in error.

By Mr. HORD:

Q. You say these are the only bottles that are brought in so close to the measure that an examination is required?

A. I didn't intend to convey that idea except in wine bottles. I don't recall any other wine imported in half liters. There is a decanter coming from Italy.

Q. The law says pints; it don't say liters. A pint is sixteen ounces?

A. Sixteen fluid ounces.

Q. This other wine, not the Italian wine, the other wine that you say comes in thirteen or fourteen ounce bottles?

A. Thirteen or fourteen ounces; that is thirty-seven centiliters. Very seldom we gauge one of fourteen ounces. The foreign measure is a liter and our measurement is a centiliter. The pints are about thirty-seven centiliters.

Q. And yet those bottles that contain thirteen or fourteen ounces, you classify them as pint bottles?

A. No, sir; I classify them as bottles holding less than a pint.

Q. They come in cases of twenty-four?

A. Sometimes twenty-four; sometimes forty-eight. I have seen them of fifty.

Q. They come under the same section of the law?

A. The same section.

Q. Did you ever know, Mr. Oyster, of this "San Rafael" running over this difference which you have marked one and three-tenths?

A. I remember in the gauging of this wine some of it ran over a sufficient amount to make an average of seventeen and three-tenths; some of it running over seventeen and three-tenths and some of it under.

Q. The average of the total bottles that you measured was one and three-tenths ounces over the sixteen?

A. Yes, sir.

Q. Did you ever see any of the "San Rafael" bottles fuller than this?

A. Do you mean did I ever see a bottle full to its entire capacity?

Q. No. Did you ever see any of those that you gauged that were fuller than this?

A. As a matter of fact, I never looked for any vacuum or vacant space in the bottle.

Q. As a matter of fact, wasn't it full right up to the cork?

A. I remember that there was a little vacant space.

Witness' testimony is closed.

26 I hereby certify that the foregoing is a correct transcript of the testimony taken before me in the above-entitled matter August 9, 1906.

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

27 In the District Court of the United States for Porto Rico.

THE UNITED STATES OF AMERICA,
vs.
CERECEDO HERMANOS Y COMPAÑIA. } 369.

I, H. H. Scoville, clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing twenty-six typewritten pages, numbering from 1 to twenty-six, inclusive, to be a true, full, and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court at San Juan, Porto Rico, this 13th day of September, A. D. 1896.

[SEAL.] H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

28 *Return on service writ.*

UNITED STATES OF AMERICA.
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Cerecedo Hmos., by handing to and leaving a true and correct copy thereof with Henry F. Hord, attorney for Cerecedo Hmos., personally, at San Juan, P. R., in said district, on the 11 day of September, A. D. 1906.

H. S. HUBBARD, *U. S. Marshal.*
By PAUL A. ENGLISH, *Deputy.*

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Cerecedo Hermanos, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the United States for Porto Rico, wherein the United States is the appellant and you are the appellees, to show cause, if any there be, why the final decision and judgment in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bernard S. Rodey, judge of the District Court of the United States for Porto Rico, this tenth day of September, A. D. 1906, and of the Independence of the United States of America the one hundred and thirty-first.

B. S. RODEY, *Judge.*

Attest:
[SEAL.]

H. H. SCOVILLE,
Clerk Dist. Court of the U. S. for P. R.

(Indorsement:) No. 369. In the District Court of the United States for Porto Rico. The United States of America vs. Cerecedo Hermanos y Compañia. Transcript of record.

(Indorsement on cover:) File No. 20453. Porto Rico D. C. U. S. Term No., 152. The United States, appellant, vs. Cerecedo Hermanos y Compañia. Filed November 9th, 1906. File No. 20453.

O

No. 152.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

UNITED STATES, APPELLANT,

v.

CERECEDO HERMANOS Y COMPAÑÍA.

Appeal from the District Court of the United States for the District of Porto Rico.

STATEMENT OF THE CASE.

This is an appeal from a decision of the District Court of the United States for the district of Porto Rico, reversing a decision of the collector of the port under which a certain duty had been levied and exacted under the tariff act of 1897 upon an importation of French wines at the port of San Juan, P. R., and directing a reliquidation of the entry at a lower rate of duty than that which had been levied by the collector and paid by the importers.

The appeal is brought under section 35 of the Porto Rican act of April 12, 1900, c. 191 (31 Stat., 77, 85), which provides that "writs of error and appeals from the final decisions of * * * the District Court of the United States" for Porto Rico

"shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeals shall be allowed in all cases where * * * an act of Congress is brought in question and the right claimed thereunder is denied;" the right claimed by the United States under the tariff act to the exaction of the duties levied by the collector having been brought in question and denied by the court.

The sole question in this case is as to the construction of paragraph 296 of the tariff act of July 24, 1897, c. 11 (30 Stat., 151, 174), which provides a duty upon still wines as follows:

> In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs * * *

The importation consisted of thirty cases of red wine from France, each containing 24 bottles holding more than one pint and less than one quart each.

The examiner measured one bottle out of every five cases, and, "returned them at seventeen and

three-tenths (ounces) to conform to the average; *none of them less than sixteen.*" (Guy H. Oyster, R., 14.)

This was an average excess in each bottle of 1.3 ounces over a pint.

Later, the importer having objected to this measurement, and a regauge having been ordered, the examiner opened additional bottles in the importer's presence, and, as he states, gauged a sufficient number to convince himself and the importer that the first gauging was correct. He again found that all the bottles contained more than one pint. He testified (R., 14): Q. Do you agree with Mr. Cerecedo that any of these bottles contained less than 16 ounces?—A. *I am quite sure they did not. There were none of them exactly 16.*

Even the particular bottle which the importers introduced in evidence contained exactly 17 ounces, or an excess of 1 ounce over a pint. (R., 12.)

The collector assessed duty at the rate of $1.60 per dozen bottles, which, after deducting the proper amount under the reciprocal commercial agreement with France of May 30, 1898, left a net amount of $1.25 per dozen bottles, or $2.50 per case of 24 bottles, as packed. (R., 2, 8.)

The importers protested against this decision, stating the following ground of protest only: "The wine in question has been assessed at $1.25 per dozen bottles when it should pay per case of 24/2 bottles." (Protest, R., 6.)

While this protest is defective both in form and substance, in that it does not distinctly indicate the ground of the importers' complaint (*United States* v. *Salambier*, 170 U.S., 621) yet, as the objection to its sufficiency which was first made before the Board of General Appraisers (R., 8) was apparently not insisted on by the Government in the district court, it will be considered here in the same manner in which it was evidently treated by all parties below and by the district court; that is to say, as intending to protest against the assessment on the ground that each case, as packed, should not have been classified as two dozen bottles "containing each not more than one quart and more than one pint," and assessed at $1.60 per dozen or $3.20 per case of 24 bottles, but should have been classified as 24 bottles each "containing not more than one pint" and assessed at the rate of $1.60 per case of 24 bottles, with an additional duty of 5 cents per fractional pint on the excess over a pint contained in such bottles. (R., 6, 8.)

In other words, the question raised by the classification and protest was whether bottles each of which contained more than a pint but less than a quart, were, as the Government contended, to be assessed under the terms of paragraph 296 at the rate specifically provided for bottles "containing each not more than one quart and more than one pint," with no additional duty, or were, as the importers contended, to be assessed at the lower rate provided for bottles "containing not more than one

pint," with an additional duty upon the excess over one pint in the several bottles.

The Board of General Appraisers, in a short opinion (T. D., 27114; Abst., 10032) containing no citation of authorities or reference to former decisions, sustained the importers' protest, saying (R., 7):

> The wine in question being contained in cases of 24 bottles, and each bottle containing over a pint, was clearly subject to duty at $1.60 per case, and any excess beyond this quantity found in such bottles would be subject to a duty only of 5 cents per pint or fractional part thereof.

Proceedings for review were brought in the District Court of the United States for Porto Rico, which, under section 34 of the Porto Rican act, has "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States" (31 Stat., 77, 84). The court sustained the decision of the Board of General Appraisers in reversing the collector's decision, and held not only that the duty should be assessed at the rate of $1.60 per 24 bottles, but that the excess duty of 5 cents per pint or fractional pint should not be assessed "for any excess beyond one pint found in each bottle"—as had been contended by the importers themselves (R., 8)—but merely on the aggregate excess in all the 24 bottles in each case (R., 9).

From this decision, which was embodied in the opinion of the court, the present appeal was taken (R., 10).

ASSIGNMENTS OF ERROR.

1. The district court erred in affirming the decision of the Board of General Appraisers and in reversing the collector's decision and directing the reliquidation of the entry.

2. The district court erred in holding and adjudging that the duty was not to be assessed at the rate of $1.60 per dozen bottles or $3.20 per case of 24 bottles.

3. The district court erred in holding and adjudging that the duty was to be assessed merely at the rate of $1.60 per case of 24 bottles plus 5 cents per pint or fraction thereof upon the aggregate of the excesses above one pint contained in all of the 24 bottles in each case.

ARGUMENT.

I.

As each of these bottles in fact contains more than a pint and less than a quart, the language of paragraph 296 of the tariff act requires that they shall be assessed with duty at the rate fixed by that paragraph upon bottles "containing each not more than one quart and more than one pint," that is, at $1.60 per dozen bottles.

The material portions of paragraph 296 are as follows:

> In bottles or jugs, per case of 1 dozen bottles or jugs, containing each not more than 1 quart and more than 1 pint, or 24 bottles or jugs containing each not more than 1 pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject

to a duty of 5 cents per pint or fractional part thereof. * * *

This paragraph specifically provides in the first clause quoted that bottles "containing each not more than 1 quart and more than 1 pint" shall be dutiable at $1.60 per case of a dozen bottles.

It is the Government's contention that this clause covers all bottles which in fact contain more than a pint and not more than a quart, regardless of the amount of the excess beyond a pint or the deficiency below a quart, and that as the bottles in question in fact contain between a pint and a quart, they are, under the plain terms of the statute, to be assessed at the rate thus specified.

The importers contend, on the other hand, that although these bottles in fact contain "not more than a quart and more than a pint" they are not to be assessed at the rate fixed for such bottles under this clause, but are first to be assessed under the second clause at the rate of $1.60 per 24 bottles as if they were bottles containing "not more than a pint," and are then to be assessed under the third clause on the excess quantity over a pint which they contain, at the rate of 5 cents per pint or fractional pint.

In other words, the Government's contention in its last analysis is that this paragraph separates still wines in bottles into three classes and fixes a specific rate of duty on each, as follows:

(a) Bottles "containing each not more than one pint," which are to be assessed as full pints at

$1.60 per 24 bottles, or at the rate of 6⅔ cents per pint; (b) bottles "containing each not more than one quart and more than one pint," which are to be assessed as full quarts at $1.60 per dozen bottles, that is, at the same rate of 6⅔ cents per pint; and (c) bottles containing "any excess beyond these quantities," which are to be assessed at the rate of $1.60 per dozen, plus 5 cents per pint or fractional pint on the excess over a quart contained in each bottle.

The importers contend, on the other hand, that bottles containing fractional quantities between a pint and a quart are not to be assessed at $1.60 per dozen; in other words, that the statute is to be construed as if the words "and more than one pint" in class "b" were omitted, so that the statute would in effect read as follows:

(a) Bottles "containing each not more than one pint," at $1.60 per 24 bottles; (b) bottles "containing each not more than one quart * * *" at $1.60 per dozen; and (c) bottles containing either more than a pint or more than a quart, at the rates of $1.60 per 24 bottles or per dozen, respectively, plus an additional duty per pint or fractional pint on the excess beyond these quantities.

The arguments in favor of the Government's construction are these:

1. It is in accordance with the language of the statute and gives due weight to every portion of

the paragraph, including especially the words "and more than one pint" which are an essential part of the description of class "b" bottles.

2. It gives an entirely reasonable and harmonious construction to the several clauses of the paragraph, by which, just as bottles containing less than a pint are assessed at the full rate of $6\frac{2}{3}$ cents per pint, so bottles containing fractional quantities between a pint and a quart are assessed at the full quart rate of $13\frac{1}{3}$ cents per quart, and by which the provision for excess duty is rendered reasonable and logical, since, although the excess rate of 5 cents per pint or fractional pint is less than the rate of $6\frac{2}{3}$ cents per pint imposed on the pint and quart bottles, such lower excess rate, when limited to bottles containing more than a quart, will, as a practical matter, secure to the Government its full rate on the quantity imported, by reason of the fact that by commercial usage a quart is the maximum capacity of the ordinary still-wine bottle, so that the rate of 5 cents per fractional pint on the slight excess in each bottle over a quart would yield the Government on such excess a rate fully equal to that on full pints and full quarts.

3. Under the Government's contention there is a clear and definite basis of classification, determined solely by the contents of the bottles and capable in every case of precise and definite ascertainment.

The construction for which the importers contend is, on the other hand, subject to the following objections:

1. It is in conflict with the language of the statute itself, and in its last analysis involves the contention that the provision in the statute relating to bottles containing "each not more than one quart and more than one pint" shall be so construed as if it read merely "containing each not more than one quart" and as if the additional words "not more than one pint" had been entirely omitted. In other words, it involves an amendment rather than a construction of the statute by taking out of its operation a class of cases which come within its plain and specific language.

In *United States* v. *Fiske* (3 Wall., 445, 448), in which the court was asked in like manner to interpolate the word "not" in a statute relating to bankers doing business as brokers, and to so construe it as to include bankers who did not, as well as those who did such business, the court said: "This would not be a construction of the statute, but an amendment thereof in direct contradiction of its language. This we do not feel at liberty to make."

2. The provision for excess duty was evidently not intended to apply to bottles containing between a pint and a quart, not merely because another and a definite rate of duty had been placed by a previous clause upon such bottles, but also because, the excess rate being less than the normal rate per

pint, the result of the application of such excess rate would be that an importer, by filling his bottles to a point just a little less than a quart, as, for example, by putting into a bottle one and nine-tenths, would, if the contention of the importers be true, secure the admission of such wine at an aggregate rate which would be less per pint than that imposed by the statute on bottles containing either a full pint or a full quart. This was evidently not contemplated, and would not only deprive the Government of a part of its intended revenue, but would also facilitate frauds upon consumers in selling underfilled quart bottles.

The answer to this argument, which was suggested by the district court, that bottles containing less than a full quart should "within reasonable limits" be treated as if they contained a full quart (R., 9), is open to serious objection.

Primarily it interpolates into the statute a standard of classification at variance with that fixed by the statute itself, in that although the statute prescribes a fixed rate upon all bottles which contain any quantity more than a pint and not more than a quart, the qualification of "reasonable limits" thus suggested would necessarily establish some intermediate point between a pint and a quart above which alone a bottle should be treated as coming within the terms of the statute, and below which it should be treated as excepted from the statute, and instead of being assessed as a full

quart, as the statute provides, should be assessed merely as a full pint plus an excess duty.

No criterion, however, was suggested by the court for determining such "reasonable limits."

The result is, therefore, that instead of the precise and unambiguous standard of classification fixed by the statute itself, which treats every bottle containing more than a pint as if it were a full quart and affords a test easy of application by collectors and applicable in all cases alike, there is in effect substituted an indefinite standard of "reasonable limits," without fixed criterion, varying under the circumstances of each particular case, and which by leaving to the opinion of the collector the point at which any given bottles should be classified as pints or quarts, makes it impossible to determine in advance the rate of duty on a given importation, and inevitably leads to endless confusion and multiplicity of litigation. On the other hand, if, in order to avoid such uncertainty, a precise fractional standard of "reasonable limits" should be gradually established, as, for example, if a pint and a half should come to be fixed as the point at which a bottle should cease to be dutiable as a pint bottle plus an excess rate and should become dutiable under the statute as a quart, this would change yet more specifically the standard of classification fixed by the statute and render still more evident the amendment of its language which would virtually have been accomplished.

3. It is perhaps also inferable from the decision of the Board of General Appraisers, although not clearly expressed, that its conclusion in this case was based on the ground that the rate of duty to be assessed on this wine was to be determined by the fact that it was packed in cases of 24 bottles rather than by the contents of the bottles themselves.

The statute, however, clearly bases the duty upon the contents of the bottles, an essential and material matter affecting the quantity of the wine imported, and not upon the number of the bottles packed in a case for transportation, an entirely incidental and immaterial matter which does not affect the quantity; the word "case" being evidently used in the statute as a mere designation of the unit of number upon which the rate of duty specified for bottles of certain given content is to be computed, and not as a basis of classification in itself.

If, of course, bottles which contain more than a pint are to be assessed with a little more than half of the duty to which they would otherwise be subject, merely because they are packed 24 bottles in a case instead of 12, it would likewise follow that bottles each containing an exact pint would be subject to double duty if they were packed as quarts, 12 in a case instead of 24, while, conversely, bottles containing a full quart would be subject to only half if packed as pints, 24 in a case instead of 12.

Obviously such a result was not intended by Congress.

As was said by Mr. Chief Justice Fuller in *Lau Ow Bew* v. *United States* (144 U. S., 47, 59):

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. *Church of the Holy Trinity* v. *United States*, 143 U. S., 457; *Henderson* v. *Mayor of New York*, 92 U. S., 259; *United States* v. *Kirby*, 7 Wall., 482; *Oates* v. *National Bank*, 100 U. S., 239.

II.

Substantially the same provision as that in the present act was contained in the act of 1875 and has been repeated in every subsequent tariff act. Under these acts it has been uniformly held that bottles of still wines containing a fraction over a pint are dutiable at $1.60 per dozen, and, further, that the classification of bottles under this provision depends upon the contents of the bottles and not upon the number packed in a case.

The provisions of these several statutes are as follows:

Act of February 8, 1875, ch. 36, sec. 2 (18 Stat., 307):

> On all still wines imported in bottles, one dollar and sixty cents per case of one dozen bottles, containing each not more than one quart and more than one pint, or twenty-four bottles, containing each not more than one pint; and any excess beyond those quantities found in such bottles shall be subject to a duty

of five cents per pint or fractional part thereof, but no separate or additional duty shall be collected on the bottles. * * *

Act of March 3, 1883, ch. 121 (22 Stat., 488, 505):

Still wines * * * in bottles, one dollar and sixty cents per case of one dozen bottles, containing each not more than one quart and more than one pint, or twenty-four bottles containing each not more than one pint; and any excess beyond these quantities found in such bottles shall be subject to a duty of five cents per pint or fractional part thereof; but no separate or additional duty shall be collected on the bottles. * * *

Act of October 1, 1890, c. 1244 (26 Stat., 567–589):

Still wines * * * in bottles or jugs per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof. * * *

Act of August 27, 1894, c. 349 (24 Stat., 509, 527):

Identical with the provision in the act of 1890.

Act of July 24, 1897, c. 11 (30 Stat., 151, 174):

Identical with the provision in the acts of 1890 and 1894.

In *In re De Luze*, T. D. 4060, a decision rendered June 26, 1879, involving an importation of still wines consisting of "cases containing twelve bottles each, each bottle containing a fraction over a quart, and cases containing twenty-four bottles each, each bottle containing a fraction over a pint," it was held by the Secretary of the Treasury, following an unreported decision of April 24, 1876, that under the act of February 8, 1875, bottles containing a fraction over a quart were chargeable with a duty of $1.60 per case of a dozen each, with an excess duty of 5 cents per bottle, and that the bottles which contained a fraction over a pint were "according to the same rule, to be regarded as liable to a duty of $3.20 per case, as bottles containing more than one pint, and not more than one quart."

In *In re Sheldon*, T. D., 14461, it was held by the Board of General Appraisers, October 14, 1893, in reference to an importation of still wines in half-pint bottles, packed in cases containing 48 bottles each, that under the act of 1890 the rate of duty did not depend upon the number of bottles packed in a case, but upon the contents of the bottles, and it was also specifically recognized that bottles containing a fraction over a pint were assessable with duty at $1.60 per dozen. Sharretts, general appraiser, delivering the opinion of the Board, after quoting paragraph 336 of the act of 1890, said:

> It will be seen there is no specific provision in this paragraph for cases containing each 48

bottles of still wine, and inasmuch as entry of this class of goods so packed is not prohibited, and duty is laid thereon per case of a given number of bottles or jugs, it would seem to us that, for dutiable purposes, every 24 bottles or jugs containing not more than one pint each of still wine is constructively one case, and subject to duty at $1.60, as provided therefor in paragraph 336.

We can not see that such a construction of the statute operates much more harshly or unjustly to the importer in this case than it would to one who imports in cases of 12 bottles or jugs containing each a small fraction over one pint of still wine, and who has to pay duty on the same at the rate of $1.60 per case.

In *In re Wyman*, T. D. 20843, decided by the Board of General Appraisers on March 9, 1899, the same construction was given to the provision of the act of 1897, which is now under consideration. The importation in question consisted of still wine packed two dozen bottles in each case, each bottle containing about $1\frac{1}{3}$ pints. The board held that duty was properly assessed at $1.60 per dozen bottles, or $3.20 per case, under paragraph 296 of the act of 1897 and overruled the protest of the importer, contending it should be assessed at $1.60 per case of two dozen bottles with an additional duty of 5 cents per pint on the excess over 24 pints per case. The board said:

It is contended by counsel for importers that the unit is the case whether it contains

> 1 dozen or 2 dozen bottles. But if this reasoning were sound there would appear to be no provision for barrels, cases, or other packages containing 4, 5, 6, 7, or 8 dozen bottles.
>
> We are of the opinion that the word "lot" or "quantity" would be a fair construction of the term "case," as used in the tariff, and this construction is in accord with the practice that has prevailed at the various ports.
>
> However that may be, the claim of the importers is untenable. The only provision for cases containing 24 bottles is when the bottles contain each not more than 1 pint. In the present instance the bottles contain more than 1 pint and the protest is overruled accordingly.

Express reference was also made in this decision to G. A. 2307, being T. D. 14461 last above cited.

The foregoing decisions were entirely overlooked both by the Board of General Appraisers and the District Court. None of them were apparently called to the attention either of the Board or of the Court, and none of them were cited by either the Board or the Court.

In view of the uniform construction which has heretofore been given to this provision—thus overlooked both by the Board and by the Court—and which has been acquiesced in since 1879, a period of almost thirty years, the present case calls for the application of the well-settled rule that even "when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it

by the Department charged with its execution, where the construction has for many years controlled the conduct of the public business," and that uniform and long-continued executive construction is "not to be disregarded without the most cogent and persuasive reasons" (*Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Healey*, 160 U. S., 136, 141); and that the re-enactment by Congress, without change, of a statute which has previously received such long-continued executive construction, is an adoption by Congress of such construction. (*United States* v. *Falk*, 204 U. S. 143, 152.)

In *Brennan* v. *United States* (136 Fed., 743, 746, C. C. A.) the court said: "Wherever, in the history of customs laws, it is found that a certain expression has received, in effect, a statutory construction, or a long and uniform use by Congress or by the departments, that construction is controlling, unless some other is necessary." The court further held in this case that where there had been a practical interpretation by the Treasury Department running for twenty-five years, by which a certain construction was given to a clause in the tariff acts, during which time Congress several times reenacted the same form of expression, this was, by well settled rules of construction, an adoption of the Treasury classification, and that such statutory construction was of the highest authority and "masters all other rules."

III.

In any event, even if these bottles are to be assessed as pints and not as quarts the excess in the bottles is to be assessed at the rate of 5 cents per fractional pint upon the excess contained in each bottle and not merely upon the aggregate excess contained in the 24 bottles in each case.

In the decision of the district court, it was not merely held that the bottles were to be assessed as pints at the rate of $1.60 per case or 80 cents per dozen, but that the provision in reference to excess was intended to mean "that the surplus made up of small quantities found in such 'pint bottles' * * * shall be subject to a duty on the aggregate of these small quantities, of 5 cents per pint or fractional part thereof," that is "that the surplus should be subject to a duty at the rate of five cents per pint or fraction thereof in the aggregate." (R., 9.)

While the Government earnestly contends that this decision is wrong in its fundamental basis, and that as the bottles each contain more than a pint they are to be assessed at a flat rate of $1.60 per dozen, yet if mistaken in this contention and if the bottles are to be assessed merely as excess pints, it is clear that the excess duty should be assessed at the rate of 5 cents per fractional pint upon the excess contained in each bottle, and not merely upon the aggregate excess in all of the 24 bottles in a case.

1. It appears from the decision of the District Court that this is all that was contended for by the importers themselves. The court said:

> The importing firm contends that the rate they should be charged is exactly one-half

this amount, plus 5 cents per pint, or fractional pint thereof, for *any excess beyond one pint found in each bottle.* (R., 8.)

Furthermore, as stated by the court, this was the construction sustained by the Board of Appraisers. (R., 8.)

The court, however, on the Government's appeal, went further, and gave a construction of the excess provision even more favorable to the importers than they had, themselves, contended for.

2. Moreover, the language of paragraph 296, that there shall be an additional duty on any excess "of 5 cents per pint or fractional part thereof," shows that the excess duty is to be assessed on each fractional pint contained in each bottle and not merely on the aggregate excess of whole pints contained in all the bottles. This is further evident from the fact that the excess duty is at the rate of only 5 cents per pint, while, as heretofore seen, the rate on full pint and full quart bottles is $6\frac{2}{3}$ cents per pint, so that if the excess rate is to be levied merely on the aggregate in all the bottles this would result in a duty on the total excess quantity in the several bottles at less than the full pint rate.

Thus the result of the holding of the district court in the present case would be that the total duty on this importation of 30 cases of still wines, by computing the excess duty merely on the aggregate excess of each case at 5 cents per pint, would be actually less than the Government would have admittedly received if the same quantity of wine included in the

entire importation had been contained in bottles containing exactly 1 pint.

Certainly such a result was not within the contemplation of Congress in framing this statute.

3. *This construction is, moreover, in conflict with an unbroken line of Treasury decisions commencing with the year 1876, in all of which it has been held that wherever the excess clause is applicable the additional duty is assessable upon the excess in each bottle, and not merely upon the aggregate excess in all of the bottles.*

In an unreported decision of April 24, 1876, which is cited in T. D. 4060, it was held by the Secretary of the Treasury that under the act of 1875 an importation of wine "contained in cases of one dozen bottles, each bottle containing a fractional part of a pint in excess of a quart," was dutiable at $1.60 per case, "and, in addition, 5 cents *per bottle*, the excess per bottle being not more than one pint."

Again in *In re De Luze*, T. D. 4060, in a decision rendered by the Secretary of the Treasury June 26, 1879, it was held that under the act of 1875 an importation of wine in cases "containing twelve bottles each, each bottle containing a fraction over a quart," was, under the ruling in the decision of April 24, 1876, chargeable with "a duty of $1.60 per case and *5 cents per bottle*."

In *In re Wyman*, T. D. 18539, decided by the Board of General Appraisers October 11, 1897, it was held that under the act of 1894 an importation of still wine in bottles, each of which contained an excess over

one quart, was dutiable at $1.60 per case of one dozen bottles, with an additional duty of 5 cents on each bottle which contained a fractional part of a pint in excess of a quart, and that this additional duty of 5 cents per pint was not to be assessed merely "on the aggregate of the excess," as claimed by the importer.

The present decision, therefore, is in conflict with an unbroken and uniform construction which has been followed since 1876, by which the excess clause in similar statutes whenever applicable has been held to refer to the excess in each bottle and not merely to the aggregate excess in all of the bottles in the case.

The attention of the District Court had evidently not been called to these Treasury decisions when it overruled the Board of General Appraisers on this point and gave a more favorable construction to the statute than even the importer contended for, as none of these decisions were cited by the court in its opinion.

IV.

For the foregoing reasons it is earnestly insisted that the decision of the District Court should be reversed and the decision of the collector in all things affirmed.

Respectfully submitted.

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